No. 14077

In the United States Court of Appeals for the Ninth Circuit

INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS

v.

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR INTERSTATE COMMERCE COMMISSION, APPELLANT

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STATUTES CITED

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STATEMENT AS TO JURISDICTION

This is an appeal from the final judgment of the District Court entered on August 25, 1953, annulling, vacating and setting aside an order of the Interstate Commerce Commission, hereinafter referred to as the Commission, dismissing the complaint of appellee which sought an award of reparation from the Southern Pacific Company (R. 74–75). The jurisdiction of the District Court was invoked under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. 1336, et seq. (R. 4).

The jurisdiction of the Circuit Court of Appeals to review a final judgment of the District Court is to be

found in Section 225, Title 28 U. S. C. The Court's attention is respectfully directed to the fact that the suit below was heard by the District Court, as ordinarily constituted, before a single judge by virtue of the decision of the Supreme Court in *United States* v. *Interstate Commerce Commission,* 337 U. S. 426 (R. 43). It is clear from that decision that judicial review of a Commission order denying reparation is under the Urgent Deficiencies Act above cited, and the only change in procedure made is that "a district court entertaining such a challenge shall be composed of one judge" instead of "three judges" and that its judgment shall be appealed to the Court of Appeals instead of "directly to this Court" (p. 441). The Court's holding was specific (pp. 440–1) that "a Commission order dismissing a shipper's claim for damages under 49 U. S. C. § 9 is an 'order' subject to challenge under 28 U. S. C. (1946 ed.) § 41 (28)" now found in substance in 28 U. S. C. (1948) § 1336. *Old Colony Furniture Co.* v. *United States,* Dist. of Mass., 95 F. Supp. 507.

The instant case was not a trial *de novo* in the District Court and the question on judicial review was simply whether the Commission acted within its statutory authority and whether its findings had a basis in substantial evidence. *Shields* v. *Utah-Idaho Central R. Co.,* 305 U. S. 177, 185. The District Court, therefore, was required to hear and decide the case in accordance with the law and procedure applicable to hearings before a three-judge court, including the principles governing judicial review of Commission orders, and the force and effect given by the courts

to administrative determinations. The rules and scope of judicial review will be dealt with in Chapter I, *infra.*

STATEMENT OF THE CASE

The appellee corporation is engaged primarily in the manufacture of wire-bound wooden boxes with plants located at Oakland, Oregon, and Toledo, Ohio (R. 78, 108–109).

On October 14, 1947, appellee filed a complaint with the Commission, in a proceeding entitled *Martin Brothers Box Company* v. *Southern Pacific Company,* Docket No. 29852 (280 I. C. C. 395), in which it alleged that during the period January 1 to September 30, 1947, the Southern Pacific Company (hereinafter referred to as Southern Pacific) failed in its duty to provide and furnish appellee with an adequate supply of box cars for the transportation of its manufactured products from the Oakland plant to interstate destinations, in violation of Section 1 (4) and (11) and Section 3 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 1 (4) and (11) and Sec. 3 (1))[1]

[1] Section 1 (4) provides that:

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation,

(R. 77–81). The relief prayed for was that the Commission enter an order commanding the Southern Pacific to provide appellee with "adequate and equal car service from Oakland, Oregon, to various destinations; and to pay to complainant the sum of $2,259,000.00 as an award for damages" (R. 80–81). The answer of the Southern Pacific, duly filed, denied the material allegations contained in the complaint (R. 81–82).

In accordance with the usual procedure, followed by the Commission in such cases, the matter was as-

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and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1 (11) provides that:

"It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Section 3 (1) provides that:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

signed for formal hearing before one of its examiners and hearings were held at Portland, Oregon, beginning on February 20, 1950. Following such hearings and the filing of briefs the examiner issued a proposed report recommending that the Commission find that the Southern Pacific failed in its duty to furnish adequate car service to appellee and that an award of damages be made in the amount of $135,220.00 for such failure (R. 84–106). Exceptions to the examiner's report were filed by the parties to the proceedings, including appellee who requested an award of damages of "at least" $205,606.00 and the case was orally argued before Division 3 of the Commission on February 14, 1951 (R. 656 et seq.). The Commission, by Division 3, issued the report and order, here under attack, on March 12, 1951. The report, which is the basis of the order (R. 127), is reported at 280 I. C. C. 395 and is in the record at pp. 108–126. In its report the Commission made the following ultimate finding (R. 126):

> We find that complainant [appellee herein] has failed to establish that defendant [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the act in furnishing or not furnishing cars to complainant at Oakland, Oreg., or that defendant subjected complainant to any undue prejudice in violation of section 3. The complaint will be dismissed.

An order dismissing the complaint was entered contemporaneously with the report (R. 127).

Appellee filed a petition for reconsideration, pursuant to Section 17 (9) of the Act (49 U. S. C. 17 (9)),[2] on May 18, 1951, to which the Southern Pacific filed a reply in opposition on July 30, 1951. The petition for reconsideration was denied by the entire Commission by order of July 30, 1951 (R. 128).

The appellee filed a complaint in the District Court of the United States for the District of Oregon on November 27, 1951, naming the Commission and the United States as defendants (R. 3). The complaint sought to set aside the order herein, alleging that it was invalid for the following reasons:

> (a) That said order lacks a rational basis because the findings do not support the Commission's conclusions.
>
> (b) The Commission failed to make essential findings of fact that would support rationally its order.
>
> (c) The Commission's findings of fact show that petitioner was damaged, is entitled to reparation, and such findings support no other conclusion.
>
> (d) The Commission misapplied the law in making the order.

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[2] Section 17 (9) provides that:

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

(e) The Commission's order is arbitrary, capricious, without support in and contrary to the law and the evidence (R. 18–27).

Appellee prayed for an order of the Court perpetually enjoining, setting aside, and annulling the order and remanding the case to the Commission "with specific directions to award petitioner such damages, as the court shall find petitioner to be entitled to under the evidence, and for further action not inconsistent with this court's decree" (R. 27, 28). It was also prayed that a statutory three-judge court be convened to hear the cause (R. 27). The prayer for a three-judge court was denied by the District Judge on authority of *United States* v. *Interstate Commerce Commission, supra* (R. 43).

The Southern Pacific, having been a defendant before the Commission, was permitted to intervene (R. 33) and it, as well as the United States and the Commission, duly filed their answers. The case came on for trial before Honorable Gus J. Solomon, United States District Judge at Portland, Oreg., on January 9 and 10, 1953. The opinion of Judge Solomon dated May 15, 1953 (R. 42) and judgment were filed August 25, 1953 (R. 74) on which date the Court's findings of fact and conclusions of law were entered, which adopted by reference its previously issued opinion (R. 40–41). The opinion and judgment are grounded on the holding that the Commission's report and order are not supported by substantial evidence (R. 63, 68, 73).

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The Court's opinion does not question the adequacy of the Commission's ultimate finding, or that it misinterpreted or misapplied the law. Therefore, the only question presented in this appeal is whether the Court below, in the review of the Commission's report and order herein, could do more than to determine whether the Commission's ultimate findings of fact are supported by substantial evidence on the record as a whole, and whether such record contains substantial evidence to support its ultimate findings that appellee failed to establish that the Southern Pacific's conduct, in furnishing or not furnishing cars to appellee at Oakland, Oreg., resulted in a violation of Section 1 or Section 3 of the Act.

SPECIFICATION OF ERRORS RELIED UPON IN THIS APPEAL

Appellant relies on the specification of errors set forth in its "Statement of Points on Which Appellant, Interstate Commerce Commission, Intends to Reply on Appeal" (R. 698–700).

Summarized they are as follows:

1. The District Court erred in attempting to weigh and evaluate the evidence upon which the Commission's findings are based instead of limiting its review to a determination of whether the findings of ultimate fact were supported by substantial evidence.

2. The District Court erred in failing to sustain the Commission's ultimate finding "that complainant [appellee] has failed to establish that defendant [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the act."

3. The District Court erred in failing to hold that the record contains substantial evidence to support the Commission's ultimate finding that the Southern Pacific did not subject the appellee "to any undue prejudice in violation of Section 3."

ARGUMENT

I

The scope of judicial review of Commission orders

As we have heretofore pointed out (pp. 2–3, *supra*), in view of the Supreme Court's decision in *United States* v. *Interstate Commerce Commission, supra,* the District Court was required to hear and decide appellee's complaint in accordance with the law and procedure applicable to hearings before the three-judge court, including the principles governing judicial review of Commission orders and the force and effect given by the courts to administrative determinations.

Determination of the ultimate question for decision involves testing the Commission's order by application of the well-established rules regarding judicial review of administrative determinations. A classical formulation of these rules was made in *Interstate Commerce Commission* v. *Union Pacific Railroad Company,* 222 U. S. 541, 547. The Supreme Court there enunciated the general principle that orders of the Interstate Commerce Commission should not be set aside by a court if they are within the Commission's statutory power and are supported by substantial evidence.

The Court's opinion does not question the adequacy of the Commission's ultimate finding, or that it misinterpreted or misapplied the law. Therefore, the only question presented in this appeal is whether the Court below, in the review of the Commission's report and order herein, could do more than to determine whether the Commission's ultimate findings of fact are supported by substantial evidence on the record as a whole, and whether such record contains substantial evidence to support its ultimate findings that appellee failed to establish that the Southern Pacific's conduct, in furnishing or not furnishing cars to appellee at Oakland, Oreg., resulted in a violation of Section 1 or Section 3 of the Act.

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Similar statements regarding the scope of judicial review are to be found in numerous other cases, including *O'Keefe* v. *United States,* 240 U. S. 294, 303; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 482, 490; *Alton Railroad Co.* v. *United States,* 315 U. S. 15, 23; *Board of Trade of Kansas City* v. *United States,* 314 U. S. 534, 546; *Interstate Commerce Commission* v. *Hoboken Manufacturers' Railroad Co.,* 320 U. S. 368, 378; *United States* v. *Wabash Railroad Company,* 321 U. S. 403, 408; *Chicago, St. Paul, Minneapolis & Omaha Railway Co.* v. *United States,* 322 U. S. 1, 3; *Gray* v. *Powell,* 314 U. S. 402, 411; and *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515. The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–7; *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 146.

The Commission's judgment is to be exercised in the light of the facts of each individual case. The courts are not concerned with the correctness of the Commission's reasoning or with the consistency or inconsistency of decisions which it has rendered. *Virginian Ry Co.* v. *United States,* 272 U. S. 658, 663–666; *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 271.

There is a presumption, in the absence of clear evidence to the contrary, that the Commission has properly performed its official duties; and this presumption supports its official acts. *United States* v.

Chemical Foundation, 272 U. S. 1, 14–15; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 358–360; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602.

In *Western Chemical Co.* v. *United States,* 271 U. S. 268, 271, the Supreme Court said:

> The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 562; *New England Divisions Case,* 261 U. S. 184, 204. No such irregularity or error is shown. In making its determinations the Commission is not hampered by mechanical rules governing the weight or effect of evidence. The mere admission of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 288. There was ample evidence to support the finding that the joint through rates regarded as entireties were reasonable and justified. Prior existing rates, whether locals or such proportionate rates from a key point to points of destination as were made applicable to this particular class of traffic, or through rates upon other commodities moving from similar points of origin, are proper matters for consideration in establishing new through rates. To consider the weight of the evidence is beyond our province.

In *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, at p. 83, the Court said:

> The function of "weighing" the evidence therefore, remains peculiarly one for the Commission "appointed by law and informed by experience," and not for the courts. *Alton Railroad Company* v. *United States,* 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586, *Gray* v. *Powell,* 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301. This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since "The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City* v. *United States,* 1942, 314 U. S. 534, 546, 62 S. Ct. 366, 372, 86 L. Ed. 432.
>
> Accordingly, aware of our duty in a proper case to set aside an order of the Commission which is not supported by substantial evidence or which is clearly based on an error of law, we refuse to accept the allegations of Virginia Stage in place of the conclusions of the Commission, since we find no patent reversible error wherein the Commission has transgressed. *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971.

These principles of judicial review have nowhere (in our opinion) been better stated than in the de-

cision of Judge Knight for the court in *Hanna Furnace Corp.* v. *United States* (affirmed, 323 U. S. 667) 53 F. Supp. 341, 344, where it was said:

> The Supreme Court has many times laid down rules which are definitely applicable here. "The credibility of witnesses and weight of evidence are for the Commission and not for the courts, and its findings will not be reviewed here if supported by evidence." *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 508, 51 S. Ct. 505, 508, 75 L. Ed. 1227. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286, 54 S. Ct. 692, 694, 78 L. Ed. 1260. "The findings of the Commission are made by law prima facie true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. * * * And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment, and of transportation relations," has had the witnesses before it and has been able to judge of them and their manner of testifying." *Illinois Cent. R. Co.* v. *Interstate Commerce Comm.,* 206 U. S. 441, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Referring to the last-mentioned case, the Supreme Court in *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 59 S. Ct. 754, 761, 83 L. Ed. 1147, which case went up on appeal from a three-judge court in this district, said: "Recognition of the Commis-

> sion's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards. From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." Vide also: *Interstate Commerce Comm.* v. *Union Pac. R. Co.,* 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308. In view of the investigations made by the Commission in the matters of concern here, the "knowledge of conditions, of environment and of transportation relations" so acquired has additional weight.

The question is not whether the lower Court, upon a consideration of the record that the Commission had before it, would make the same findings as the Commission; the question rather is, Was there rational basis for the findings that the Commission did make?

It is well established by the courts that the ultimate findings of the Commission as to whether or not rates, tariffs, regulations, or practices of railroads are in violation of Sections 1, 2, and 3 of the Act, are questions of fact to be determined by the Commission and are not questions of law for determination by the Courts. *Lynchburg Traffic Bureau* v. *United States,* 84 F. Supp. 1012, 1016; *Johnston Seed Co.* v. *United States* (Tenth Circuit), 191 F. 2d 228, 231; *Illinois Cent. R. R.* v. *Inter. Com. Comm.,* 206 U. S. 411, 441, 455; *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361; *Board of Trade of Kansas City* v. *United States,* 314 U. S. 534, 546; *Swift & Co.* v. *United States,* 316 U. S. 216, 230–231.

From a review of the cases cited in this chapter of our brief, it is clear that the District Court's function is limited to a determination of whether the Commission's ultimate findings of fact are supported by substantial evidence on the record as a whole. Therefore, that court committed error in attempting to analyze and weigh the evidence summarized in the Commission's report (no consideration being given to the other evidence of record) instead of determining whether there was substantial evidence on the whole record to support the Commission's ultimate finding of fact which was all that the court could do in the premises.

We shall now turn to a discussion of the evidence which we feel amply supports the Commission's findings.

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II

The evidence supports the Commission's finding that the Southern Pacific did not engage in any unreasonable or otherwise unlawful practice in violation of Section 1 of the Act

Bearing in mind the rules applicable to judicial review of orders of the Commission and that the weighing of the evidence in a particular case is for the Commission, referred to at pages 9 to 15 of this brief, we now consider the evidence the Commission had before it bearing on both the alleged Sections 1 and 3 violations.[3]

The following witnesses appeared before the Commission and testified:

The first witness called, F. J. Martin, the President of the plaintiff (R. 131), testified as to the operation of the plant at Oakland, Oreg. (R. 131–137). His plant has loading space for about 25 rail cars (R. 137–138). His plant is dependent on rail service (R. 143). His nearest competitors on wire-bound boxes were at Houston, Tex., and Kansas City, Mo. (R. 144). Before locating his plant at Oakland witness talked with railroad officials about car supply (R. 146–147) and advised they would need approximately 13 cars per day 5 days a week (R. 149). His company had booked 200 carloads of wire-bound boxes for sale to purchasers before the plant started (R. 155). Even before

[3] The appellee had alleged in its complaint before the Commission that the Southern Pacific had failed to provide it with transportation from its plant at Oakland, Oreg., to various destinations upon reasonable request therefor and to furnish it with adequate car service, in violation of Section 1 (4) and (11), and also had subjected appellee to undue and unreasonable prejudice in violation of Section 3 of the Act.

starting to ship boxes his company encountered a car shortage beginning in August of 1946 (R. 157). The number of cars his company shipped from Oakland to Toledo, beginning in January 1947, were as follows:

January	32 cars.	June	6 cars.[1]
February	47 cars.	July	2 cars.
March	27 cars.	August	6 cars.
April	10 cars.	September	None.
May	12 cars.		

[1] The most severe shortage of cars was from June to October 1947 (R. 616).

During the complaint period we received less than three cars per day average (R. 171). There was a car shortage on the Southern Pacific during the 9-month complaint period (R. 177–178). The witness stated his company put in plywood machinery to change the operation into plywood (R. 192). When he took over the plant on March 4, 1946, between 12 and 15 cars could be spotted on the track at the Oakland plant (R. 197–198). Six cars could be spotted in loading position at Oakland at that time (R. 198). He had to have watertight box cars for our wire-bound boxes during the complaint period (R. 209). The California Barrel & Box Company at Arcata, Calif., is his competitor in the West in connection with the manufacture and sale of wire-bound boxes (R. 209–210). Witness stated he never signed a car order in his life although he had ordered hundreds of cars (R. 224). The railroad never refused to accept a car after it was loaded and he gave them the shipping papers. He moved lots of Southern Pacific cars to points off the Southern Pacific lines during the complaint period (R. 228). On July 1 to September 24, 1947, he received a total of 201 cars (R. 257–258). To keep one shift running at the Toledo mill it was

necessary to have 65 cars of lumber per month (R. 268–269).

The next witness was Mr. R. G. Holland, package designing engineer and sales representative of the Martin Bros. Box Company (R. 276). He testified that he made daily calls to the local railroad office in 1946 in an effort to secure more cars; also between April 1 and July 1, 1947 he made daily efforts to secure more cars (R. 284). Through these efforts he secured an additional occasional car for his plant (R. 287).

Mr. William F. Forrest, Eugene, Oreg., President and General Manager of the Forrest Veneer Company, Curtin, Oreg. (R. 297), testified his company found it more difficult to secure cars at Eugene, Oreg., than at Portland (R. 300). He testified as to the survey he made for complainant concerning its transportation situation (R. 303). The survey extended from January 2, to May 5, 1948, and the interviews made during this survey were detailed (R. 304–307). In the past year witness said he examined the records of the Southern Pacific showing shipments by complainant and shipments by other shippers along Southern Pacific lines, consisting of the original car orders of the Southern Pacific Company covering the period between July 1 to September 30, 1947, and going back to January 1, 1947, on some of the records (R. 307–309). Included therein he examined the car order records relating to complainant's plant at Oakland, Oreg., covering January 1 to September 30, 1947, and he had prepared a tabulation from these original records showing cars ordered, dates ordered, dates

wanted, cars received, and date of reception for this period (R. 309). He prepared a similar statement for the loads of the Jones Lumber Company, Portland, Oreg., the Guistina Lumber Company, Eugene, Oreg., for the period July 1 to September 30, 1947; for the Zellner Lumber Company, Eugene, Oreg., for the same period; for the Eugene Fruit Growers, Eugene, Oreg., for the same period; with respect to the shipments of the Oregon Pulp & Paper Company, Salem, Oreg., for the same period; for Interstate Terminals, Portland, Oreg., for the same period; all taken from Southern Pacific car orders and showing Southern Pacific car service at each of those plants (R. 309–312). The record of Jones Lumber Company from the period July 1 to July 30, 1947, shows but few cars that run over two days of receiving a car after being ordered (R. 312). Delivery to the Guistina Lumber Company was also, for that period, in such a manner as to make reasonable operation of the plant from the transportation standpoint "reasonably good" (R. 313). The figures show that Zellner Lumber Company was not inconvenienced by lack of delivery of cars. The same is true with respect to Eugene Fruit Growers and Oregon Pulp & Paper Company, as well as Interstate Terminals (R. 313–314). With respect to Martin Brothers Box Company, Oakland, Oreg., from "the period January 1 to the period of July, [1947] the placement on order appears to be satisfactory." From July 22, to be exact, the placement of car orders would average from July 22 to July 31, approximately 4.3 days delay on each car used. In August—incidentally, in July the longest wait for any

one car was 21 days. In August the average delay in placement of cars in the matter of car order days is approximately 8.47 days per car. They had five cars delayed 15 days or more. The longest delay was 19 days. In September they had an average delay of approximately 8.7 days per car order. They had 10 cars delayed 10 days or more. The longest delay was 28 days on one car (R. 315). It was the witness' understanding that telephone orders of the Timber Structures were reduced to writing (R. 321). Looking at Exhibit 8, with respect to the Martin Brothers Box Company, there are some situations that show the cars were wanted on a certain date and were placed on an earlier date. The record also shows car orders in the Martin Brothers Box Company books of orders that showed more than the number of cars ordered placed (R. 324); some of the car orders were signed and some were unsigned (R. 325). Some of the cars for Timber Structure Company to a considerable extent during July, August, and September 1947, were appropriated cars that came in under load (R. 326).

At Eugene, Oreg., he had more trouble getting empty cars for the Timber Products plant than he did at Portland, Eugene being a competitive point. None of the companies referred to manufacture wirebound boxes to his knowledge (R. 327–328). The records show that from January 1 to September 30, 1947, Martin Brothers received a few cars every day (R. 328) and the average delay in placing the car was the figure given on the exhibit (R. 329). In figuring those averages witness gave consideration to

the cars that were placed ahead of the date they were ordered (R. 330).

Witness Zebulski, presently employed as treasurer by the Martin Brothers Box Company, Toledo, Ohio (R. 348), testified that his estimate of full car requirements, 42 cars a week (R. 363), was based upon a two-shift operation for the box plant, and one shift for the sawmill (R. 364).

Mr. Hugo Erdman, Toledo, Ohio, assistant to the president of the Martin Bros. Box Co. (R. 392), introduced and testified with respect to Exhibit 11, showing the different commodities manufactured at the Oakland plant and the cars required in those operations (R. 394); also showing the cars actually furnished (R. 400). The minimum number of cars required by Martin was 8.4 cars per day (R. 401). The exhibit shows the cars shipped to the Toledo plant during the complaint period (R. 425–426). It reflects every car furnished the Martin company for shipment from Oakland (R. 429).

Mr. L. P. Hopkins, an employee of the Southern Pacific Company, testified that they gave the track capacity of the plant of Martin Bros. at Oakland, Oreg., as 25 cars (R. 423).

Mr. E. C. Poole, manager, Bureau of Transportation Research of the Southern Pacific Company (R. 439), introduced a number of exhibits with respect to freight cars ordered built and owned, freight cars delivered to all railroads in the United States (R. 444–445). There was a shortage of cars in 1947 (R. 446). His Exhibit No. 15 shows carloads of revenue freight carried by the Southern Pacific Com-

pany (R. 447–448). In 1947, compared with 1945, there was in excess of 100,000 less carloads made empty on the Southern Pacific which it had received from its connections (R. 449). Exhibit No. 16 shows the interchange of tonnage at Portland, Oreg., with railroad connections for the period 1927 to 1948. The significant thing is that the traffic both received and delivered had a very great increase (R. 451). The car shortage was due to the fact that the greater number of cars are delivered to connections loaded than received and empties must be secured to make up the gap (R. 452). The witness testified that prior to the war, the trend of tonnage was eastward and westward during the Pacific war. The trend reversed itself immediately after the war (R. 454–456).

His Exhibit No. 20 shows freight cars ordered from 1940 to January 1, 1950, from the Southern Pacific Company, which numbered 32,913 (R. 460). An exhibit introduced by this witness also showed the large increase in industries located on the lines of the Southern Pacific (R. 465–466). The effect of the 5-day workweek in industry generally on freight car supply was shown (R. 468–469).

Mr. B. T. Ayers, superintendent of freight-car service, Southern Pacific Company (R. 501), testified with respect to freight-car shortage during the complaint period in 1947 both Nation-wide and with respect to the Southern Pacific (R. 503–504).

Exhibit No. 30 shows the increase in demand for cars during the complaint period in 1947 compared with the same period in 1946 (R. 505–506). That increase on the Portland Division was 31,960 cars.

During the complaint period the railroad was short boxcars, flatcars, and gondolas, which is the type of car used generally for lumber loading (R. 506–508).

Exhibit No. 34 relates to orders permitting the substitution of refrigerator cars in lieu of boxcars (R. 511–513). The strike of Southern Pacific engineers on July 21, 1947, had an effect on Southern Pacific cars because the shippers had, anticipating a strike on the Southern Pacific, moved their freight via other lines. The effect of that was felt by the Southern Pacific for more than 3 or 4 weeks (R. 515–516). Mr. Ayers also testified with respect to certain restrictions as to loading cars to certain destinations (R. 517–518).

Mr. L. P. Hopkins, superintendent of the Portland Division, Southern Pacific Company (R. 532), described the through freight-train operations as they existed in 1947 on that division (R. 537–540). He also described the local freight-train operations on the Portland Division (R. 541–543). He testified with respect to the location of lumber mills and shippers located on the Southern Pacific and its short line connections, dependent on the Southern Pacific for freight cars (R. 543–546; and the advantages a shipper has in being located in the switching yards of a railroad terminal involving the speed in which car loaders may be supplied over shippers not so located were depicted (R. 550–551). There was no more delay on the Southern Pacific in furnishing cars to shippers at noncompetitive points than at competitive points (R. 552–554). On the Portland Division there was a car

shortage, off and on; on the Southern Pacific in the first 9 months of 1947; the most serious shortage was from July until the latter part of October in 1947 (R. 555–556).

Mr. G. M. Leslie, chief clerk to superintendent of the Portland Division, Southern Pacific Company (R. 558), exercising general supervision over the distribution of empty equipment, was familiar with the car shortage which took place in 1947 on the Southern Pacific, Portland Division (R. 559–560). He described the formula for determining the number of cars shippers would be entitled to during the period of shortage which was based on the cutting capacity of the sawmill in an 8-hour period and the capacity of a mill to load a certain number of cars in an 8-hour day, as well as the supply of cars available for distribution and car orders filed with the carrier by the mill (R. 561–564). They would not furnish cars to a mill if there were no car orders on file. Witness stated that during the car-shortage period of 1947, he applied the formula after July 1, 1947, to all lumber shippers on the Portland Division, including Martin Brothers. The formula was not in effect prior to July 1, 1947, because the car shortage was not of sufficient severity to require it (R. 565–566).

Mr. R. J. Robinson, special clerk, Bureau of Transportation Research, Southern Pacific Company, whose function it is to make studies of transportation problems, etc., came to Oregon after this complaint was filed and made a study of the car orders of Martin Brothers on file with the agent at Oakland. He abstracted the car orders of the Martin Brothers by

order number, dates, type of equipment ordered, type of equipment furnished, car number, and the lading shown in those car orders, the results of which are incorporated in Exhibit No. 40, which covers the period January–September, inclusive, 1947 (R. 567). His Exhibit No. 41 is a summary of empty freight cars ordered by Martin Brothers furnished by the Southern Pacific during the complaint period (R. 577). As adjusted it shows a total of 593 cars furnished; 565 cars ordered (R. 578). Those car orders were generally furnished by R. L. Stapleton, but some of them had no signature. Percentage of the cars furnished for the 9-month period compared with cars ordered are detailed (R. 579–580). His Exhibit No. 42 is a 26-page statement showing daily yard check of freight cars on spur of Martin Brothers during the complaint period (R. 580). One car was held for as long as 8 days; several were held more than 2 days (R. 585–586).

Mr. F. C. Nelson, freight-traffic manager, Southern Pacific Company, Portland, Oreg., occupying that position during the complaint period (R. 591–592), introduced exhibits showing, among other things, the shift in the lumber industry from western Washington to western Oregon (R. 595–596); the growth of new industry on the Southern Pacific and in western Oregon, with its consequent burden on the car supply (R. 599–602). Witness expressed the opinion that Mr. Martin was not being fully informed by his plant of what the actual conditions were in supplying cars (R. 603–605). Representatives of the Box Company gave witness a lot of information as to how many cars

they wanted at Oakland, but he said rarely did he ever get two alike (R. 609–610). Witness told Mr. Holland of that company to be sure and have his people place car orders for the cars as there seemed to be confusion in his organization "as to how many cars they wanted." Holland told witness he wanted 8 cars a day and that reefers and stockcars would be acceptable (R. 610). Witness stated there was a wide fluctuation in the movement of traffic out of the Martin Brothers plant, ranging from as little as 17 cars a month to over 100 cars a month (R. 615). Witness testified as to complaints received from other lumber shippers, stating that there were some complaints registered in the early part of the year when they had a car shortage but it was not as severe as it was from July to October of 1947 (R. 616). In the conversation the witness had with Mr. Holland in August of 1946 (R. 630), he stated Mr. Holland said he would be willing to accept refrigerator cars and stockcars and witness explained to him that it was necessary to place car orders for those, too (R. 630–631). Witness stated that the railroad was trying to "make the car supply stretch as far as we could while we were in difficulty," and that it didn't have sufficient cars to supply the lumber industry or other shippers in Oregon (R. 631).

Mr. A. M. Bogen, Oakland agent of the Southern Pacific in 1947 (R. 634), said he frequently went over to the Martin Brothers plant to check the yard. Practically all of the orders he received were brought in by R. L. Stapleton (R. 636–637). Usually Mr. Stapleton had the car orders made out before he came to the

agent's office; he would generally have the car orders made out before he got there, although sometimes he would make the orders right at the depot (R. 638). Most of the time the railroad agent at Eugene knew what cars Martin Brothers would have, and many calls were made there to find out how many cars were going to be placed, and then an order would be placed (R. 638–639).

In addition to this evidence, 48 exhibits were introduced by the various witnesses in support of their testimony.

As the Supreme Court said in *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 513:

> With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each, acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive. *Interstate Commerce Commission* v. *Union Pacific R. Co.,* 222 U. S. 541, 550.

It is clear from the evidence of record, much of which is contained in the foregoing summary, that the Commission's ultimate findings of fact have substantial evidentiary support.

In regard to appellee's allegation that the Southern Pacific had failed to provide it with transportation of

property from Oakland, Oreg., to various destinations upon request therefor and to furnish it with adequate car service, in violation of Section 1 (4) and (11) of the Act (R. 78), the Court's attention is directed to Section 1 (4) which provides that a rail carrier is only required to furnish cars to a shipper upon "reasonable request therefor."

The evidence summarized above shows that there was a critical shortage of cars on the Southern Pacific (as well as on all the other railroads in the country) during the period covered by the complaint, a fact admitted by appellee's president (R. 177–178). The orders for empty cars for transporting lumber on the Portland Division of the Southern Pacific were far in excess of the supply available (R. 446–453, 501–506). The testimony shows that the information given to the Southern Pacific by the employees of appellee as to the need for cars was conflicting (R. 609–610) and that the railroad's representative told Mr. Holland, sales representative of appellee, that it was necessary for the shipper to place definite car orders so as to remove the confusion as to its needs (R. 610). The testimony shows that the evidence is conflicting as to the number of cars required from day to day by appellee and it is clear that it was the practice of the Southern Pacific to furnish cars to the shippers of lumber in Oregon, including appellee, when clear and definite orders for placing were received. It is also clear that the railroad did not require that written orders be placed and that oral orders were honored when clear and definite (R. 589–590) as to appellee's daily need. It is submitted that this policy of the railroad meets with the requirement of Section 1 (4)

with respect to the duty to furnish cars upon reasonable request.

The reasonableness of the requirement for furnishing cars only on specific orders is apparent when consideration is taken of the railroads' car demurrage rules and regulations which would not allow the collection of demurrage charges on cars placed by a railroad, no matter how long held by the shipper, if furnished in the absence of a specific order therefor. It is submitted that a prerequisite to the duty of a carrier, under Sec. 1 (4), to furnish cars is that specific day to day orders should be made.

The evidence shows that due to the critical car shortage and the emergency conditions prevailing in connection therewith that the Southern Pacific attempted to prorate the cars between shippers of lumber so that there may be an equitable distribution of the available supply. In this endeavor it appears that the Southern Pacific attempted to furnish every available car that could be used by appellee (in addition to boxcars) including gondolas, flatcars, reefers, and refrigerator cars, which appellee agreed to accept and used for the transportation of its products.

The railroad also devised a formula for determining the number of cars shippers would be entitled to during the most severe period of the shortage, which was after July 1, 1947 (R. 561–566). The record shows that appellee was furnished all the cars for which it placed specific orders during the nine-month period covered by the complaint (Exhibit 8, R. 324).

It is respectfully submitted that the evidence of record shows that in numerous instances the orders placed by appellee with the Southern Pacific for cars,

during the complaint period, were not definite and specific as to the number needed and they were indefinite as to the dates on which to be furnished. The evidence on the record as a whole amply and fully supports the Commission's ultimate finding that appellee failed to establish that the Southern Pacific engaged in any unreasonable or otherwise unlawful practice in violation of Section 1 of the Act in furnishing or not furnishing cars to appellee during the period January 1 to September 30, 1947.

III

The evidence supports the Commission's finding that the Southern Pacific did not subject appellee to any undue prejudice in violation of Section 3 of the Act

In the complaint proceedings before the Commission it was alleged that the Southern Pacific had failed to provide car service from complainant's Oakland, Oreg., plant in the same proportion to its actual requirements as were provided to other shippers on the railroad's line (R. 78–79), and that such failure subjected complainant (appellee herein) to undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Act (R. 80). In regard to this allegation the Commission found that appellee failed to establish a Section 3 violation. That this ultimate finding of fact is supported by substantial evidence will readily appear by reference to the testimony of record, much of which is to be found in the summary of evidence contained in Chapter II, *supra*.

The evidence shows that shippers on the Portland Division of the Southern Pacific, other than appellee,

had experienced delays in receiving cars. Witness Nelson, Freight Traffic Manager of the Southern Pacific, testifying as to the car shortage situation stated that the railroad had received numerous complaints from other lumber shippers during the period from January 1 to September 30, 1947. He stated, in respinse to the following questions of counsel: (R. 616.)

> Q. Had you received complaints from any other lumber shippers about the car supply during the period from January 1 to September 30, inclusive, 1947?
>
> A. Yes; we did. There was some complaints registered in the early part of the year when we had a car shortage, but it was not as severe as it was later on in the year from July to September and October. During the period from July 1947 to October, September, and the rest of the year, why we received thousands of complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise.
>
> Q. What was the general nature of those complaints?
>
> A. They were complaining over the fact we were not supplying them with all the cars they wanted. The complaints were spread all over the State of Oregon, even originated in numerous and various parts of the United States. Of course, I only have knowledge of the particular complaints that we received through my office, most of which reached me, if not personally, by word of mouth from those under my jurisdiction and as well I knew a few people at points such as Salem, Eugene, Medford, were also receiving complaints in countless numbers.

Witness Hopkins, Superintendent of the Southern Pacific's Portland Division, testified that there was no more delay in furnishing cars to shippers at noncompetitive points than at competitive points (R. 552–554).

The evidence also shows that during the complaint period appellee's treatment in the matter of being furnished cars was no better or worse than other shippers of lumber in the area. They were all placed on the same basis as the railroad pro rated the cars in accordance with a formula which was used to determine the number of cars shippers were entitled to receive during the most critical, shortage period, beginning on July 1, 1947 (R. 561–566).

The evidence further shows that no lumber mill was furnished with more cars than for which the Southern Pacific had received specific oral or written daily orders (R. 565); that appellee was furnished with all cars during the complaint period for which it placed specific oral or written orders, and that there were times in which appellee received more cars than ordered and that some cars were placed earlier than the date for which ordered (R. 324).

Such evidence as the above clearly refutes appellee's charge of undue and unreasonable prejudice and disadvantage to it by a failure of the Southern Pacific to provide car service from its Oakland plant in the same proportion to its actual requirements as provided other shippers on the railroad's line.

The record also fails to show that appellee was subjected to competition since it produced only wirebound boxes and was not engaged in the sale of lumber

as such. In the absence of proof of competition an allegation of undue prejudice and preference cannot be sustained. *Americus & Co.* v. *Pennsylvania R. R. Co.,* 181 I. C. C. 5, 10; *California Cotton Oil Corp.* v. *Atchison, T. & S. F. Ry. Co.,* 218 I. C. C. 97, 105; *Traffic Bureau, Lynchburg Cham. of Com.* v. *C. & O. Ry. Co.,* 234 I. C. C. 765, 768.

It is respectfully submitted that the Commission's finding that appellee had failed to establish that the Southern Pacific had subjected it to any undue prejudice, in violation of Section 3, is supported by substantial evidence.

The record in the Commission proceedings fails to reveal that appellee is entitled to an award of reparations. There is an utter lack of proof of damages.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed, and the case remanded with instructions that the Court enter a judgment sustaining the Commission's report and order, and that the cause be dismissed.

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